IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Arbitration Case No.268 of 2006
Date of decision: 30.3.2007

M/s Emm Enn Associates

... Petitioner
in person.

v.

Commander Works Engineer and others

... Respondents
through
Sh.Ashwani Bansal,Advocate

CORAM: HON'BLE MR.JUSTICE VIJENDER JAIN,CHIEF JUSTICE.

Present: Mr.O.P.Gupta petitioner, one of the partners of the firm in person.

Mr.Ashwani Bansal, Advocate, for the respondents.

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1. Whether the Reporters of Local News paper may be allowed to see the judgment ?

2. To be referred to the Reporters or not ?

3. Whether the judgment should be reported in the Digest ?

Vijender Jain, Chief Justice (Oral)

This petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996, by the petitioner, inter alia on the ground that there is an arbitration clause in the agreement, which is to the following effect:-

*"70.**Arbitration**:- All disputes, between the parties to the Contract (other than those for which the decision of the C.W.E. Or any other person is by the contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of a serving officer having degree in Engineering or equivalent or having passed final/direct final examination of Sub Division II of Institution of Survey or (India) recognised by the Government of India to be appointed by the authority mentioned in the tender documents.*

Unless both the parties agree in writing such reference shall not take place until after the completion or alleged completion of the Works of termination or determination of the Contract under Condition Nso.55,56 and 57 thereof.

Provided that in the event of abandonment of the Works or cancellation of the Contract under Condition Nos. 52,53 and 54 hereof, such reference shall not take place until alternative arrangements have been finalized by the Government to get the Works completed by or through any other Contractor or Contractors or Agency or Agencies.

Provided always that commencement or continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the contractor as provided in Constitution 67 thereof.

If the Arbitrator so appointed resigns his appointment or

vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place.

The Arbitrator may proceed with the arbitration , exparte, if either party inspite of a notice from the Arbitrator fails to take part in the proceedings.

The Arbitrator may, from time to time with the consent of the parties, enlarge, the time for making and publishing the award.

The Arbitrator shall give his award within a period of six months from the date of his entering on the reference or within the extended time as the case may be on all matters referred to him and shall indicate his findings, along with sums awarded, separately on each individual item of dispute. If the value of the claims or counter claims in an Arbitration reference exceeds Rs.1 lakh, the Arbitrator shall give reasons for the award. The Arbitrator shall give reasons for the award in each and every case irrespective of the value of claims or counter-claims.

The venue of the Arbitration shall be such place or places as may be fixed by the Arbitrator in his sole discretion.

The award of the Arbitrator shall be final and bonding on both parties to the contract."

It is the contention of the petitioner that the petitioner was made the payment of undisputed portion of the bill on 31.3.2002 as at that time the petitioner was in the dire need of money and, therefore, he

accepted the same without any protest. However, on 23.2.2005, the petitioner invoked the arbitration clause and also mentioned in para 3 of the said letter that it was on account of the pressure of the department that without reservation of any protest the payment was received by the petitioner.

Learned counsel appearing for the respondents has contended that the said letter invoking the arbitration on 28.2.2005 was replied by the respondent vide letter dated 7.5.2005 in which it was mentioned that the petitioner had furnished no claim certificate and payment was made in full and final satisfaction and accord of satisfaction was complete and, therefore, nothing was to be paid to the petitioner. Learned counsel for the respondents has relied upon **SBP and Co. v. Patel Engineering Ltd and another: 2005 (8) SCC 618 (** specifically on paras 36 and 38 of the said judgment).

I have heard the petitioner in person and the learned counsel appearing for the respondents.

Since the petitioner has invoked the arbitration clause in terms of the agreement on 23.2.2005 and also annexed the list of claims along with it, the question, Whether a claim does subsist ? is a matter which has to be referred for arbitration. I find support from what has been held in **Union of India and another v. M/s L.K.Ahuja and Co. AIR 1988 Supreme Court 1172.** Para 8 of the said judgment reads as follows:

> *"8. In view of the well settled principles we are of the view that it will be entirely wrong to mix up the two aspects, namely, whether there was any valid claim for reference under*

S.20 of the Act, and, secondly, whether the claim to be adjudicated by the arbitrator, was barred by lapse of time. The second is a matter which the arbitrator would decide unless, however, if on admitted facts a claim is found at the time of making an Order under S.20 of the Arbitration Act, to be barred by limitation. In order to be entitled to ask for a reference under S.20 of the Act, there must be an entitlement to money and a difference or dispute in respect of the same. It is true that on completion of the work, right to get payment would normally arise and it is also true that on settlement of the final bill, the right to get further payment gets weekened but the claim subsists and whether it does subsist, is a matter which is arbitrable. In this case, the claim for reference was made within three years commencing from April 16, 1976 and the application was filed on December 18, 1976. We are, therefore, of the view that the High Court was right in this case. See in this connection the observations of this Court in Major (Retd) Inder Singh Rekhi v.D.D.A. (1988)2 JT 6: (AIR 1988 SC 1007)."

In view of what has been discussed above and the fact whether the claim subsists or not, is to be decided by the Arbitrator. With the consent of the parties, Mr.Abhay Kumar Sinha, Addl.Chief engineer, Principal Director (Planning), HQ,Chief Engineer Chandigarh Zone, `N' Area, Airport Road, Chandigarh, is appointed as the sole arbitrator to settle the dispute between the parties.

The Arbitrator shall fix his own fee. The parties shall appear

before the Arbitrator on 4.5.2007 at 4 P.M.

Registry is directed to send the intimation to the Arbitrator accordingly. The petition stands disposed of.

(VIJENDER JAIN)
CHIEF JUSTICE

March 30, 2007

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